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Supreme Court, U.S.
FILED
APR 5 1995
OFFICE OF THE CLERK

No. 94-1287

In the Supreme Court of the United States

OCTOBER TERM, 1994

PHILLIPS PETROLEUM COMPANY, PETITIONER

v.

GARY JOHNSON, AREA MANAGER, DALLAS AREA COMPLIANCE OFFICE, MINERALS MANAGEMENT SERVICE, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government does not dispute that the decision below allows the Minerals Management Service ("MMS") unlimited time to bring royalty collection actions, despite the six-year statute of limitations for actions "founded upon any contract." 28 U.S.C. § 2415(a). The government also does not dispute that the Fifth Circuit's reading of the statutory term "action for money damages" squarely conflicts with several other circuits' interpretations of that term as it is used in Section 2415(a). See Pet. 13-14. The government does not deny that most royalties paid on federal mineral leases are paid on leases within the Fifth Circuit's territory, so that, regardless of the positions of the other courts of appeals, the decision below will have sweeping effects on mineral lessees.

The government not only does not contest the importance of the holding below, but admits (Br. in Opp. 19-20) that the

same question is presented in more than a dozen cases currently in the district courts. The government mistakenly suggests that the existence of so many cases warrants the denial of review here. On the contrary, the proliferation of similar cases demonstrates the recurring importance of the question presented. The government offers no hope that the flood of stale royalty claims will abate.[1]

Instead, the government offers several insupportable arguments. First, the government claims that the Tenth Circuit did not mean what it said when it "agree[d]" that Section "2415(a) is the controlling statute of limitations" for MMS royalty collection actions (*Phillips Petroleum Co.* v. *Lujan*, 4 F.3d 858, 860 & n.1 (1993)), and when it reiterated that "the statute of limitations would * * * be[] a defense to payment" in those actions (*Mesa Operating Limited Partnership* v. *Lujan*, 17 F.3d 1288, 1291 (1994)). Second, the government defends the merits of the decision below. The government claims that the Federal Oil and Gas Royalty Management Act ("FOGRMA"), which applies an identical six-year limitations period to other contexts, silently displaces Section 2415(a) as it applies to mineral leases. The government further contends that an action to enforce an obligation under a mineral lease is not "founded upon a[] contract." Finally, the government claims that stale royalty collection actions do not implicate the policies of statutes of limitations. These meritless assertions should not dissuade the Court from reviewing this case.

1. The government attempts to minimize the conflict between the Fifth and the Tenth Circuits. Br. in Opp. 18-20. The government does not deny that these two courts of

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[1] The government suggests (Br. in Opp. 20 n.14) that this Court should postpone consideration of the threshold question whether Section 2415(a) applies until more lower courts reach the issue of tolling under Section 2416(c). But the presence of subsidiary questions in some cases is no reason not to consider the primary question in all of the cases.

appeals have jurisdiction over the greatest number of mineral leases, nor does it dispute that the decision below is binding Fifth Circuit precedent. Instead, the government claims (Br. in Opp. 19) that the Tenth Circuit "has never addressed the question presented by the petition."

The panel of the Tenth Circuit that expressly "agree[d]" that Section 2415(a) applied to MMS royalty collection actions (*Phillips*, 4 F.3d at 860 n.1) most certainly "addressed the question." Three additional Tenth Circuit judges accepted as settled law that the statute of limitations provides a defense against stale collection efforts by the MMS. See *Mesa*, 17 F.3d at 1291.

The application of Section 2415(a) to royalty collection actions was a necessary premise for the decisions in both cases. The government nonetheless asserts that *Phillips* lacks precedential value because the question whether the limitations period applied, as opposed to *how* it applied, "was neither briefed nor argued to the court of appeals." Br. in Opp. 18. But the tolling question before the *Phillips* court would have been meaningless — and any decision would have been nugatory — unless Section 2415(a) in fact applied to royalty collection actions. The "mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding." *Monell* v. *Department of Social Services*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring); see also *United States* v. *Pierre*, 781 F.2d 329, 333 (2d Cir. 1986). The Tenth Circuit's holding, although terse, clearly was "considered." Rather than assuming that the limitations provision applied, the court first held that "oil and gas leases are contracts." It then reasoned that "§ 2415(a) is the controlling statute of limitations" because it applies to every government action "'which is founded upon any *contract*,'" and added judicial emphasis to the statutory text. 4 F.3d at 860 n.1.

In *Mesa*, the question whether "Mesa's conduct * * * precluded any application of the statute of limitations" (Br. in Opp. 19) likewise would have been meaningless if — as the government argued in its Tenth Circuit brief (see *ibid.*) — the statute did not apply to mineral lease royalty collection actions at all. Citing *Phillips*, the Tenth Circuit responded to the government's argument in no uncertain terms: "The statute of limitations would have been a defense to payment * * * ." 17 F.3d at 1291. The court reiterated that its waiver holding alone deprived Mesa of what otherwise would have been "the cover of the statute of limitations to avoid payment of the royalties." *Id.* at 1291-1292. The Tenth Circuit did not fail to "reach" the government's argument that the statute did not apply at all (Br. in Opp. 19); rather, the court rejected that contention out of hand on the authority of *Phillips*.

As we demonstrated in the petition (at 11-15), the conflict between the law of the Tenth Circuit and the decision below warrants resolution by this Court.

2. Both before and after the enactment of the FOGRMA, government officials repeatedly acknowledged that Section 2415(a) applies to royalty collection. Indeed, the Procedure Paper that the government seeks to uphold in No. 94-1292, and which provided the basis for some of the MMS's most egregious attempts to enforce stale claims in this case (see Pet. 7), explicitly acknowledged that "[b]ecause of the six-year statute of limitations, the MMS is generally concerned only with" royalty payments within past six years. See No. 94-1292 Pet. App. 131a. Until recently, few have doubted that mineral royalty collection efforts ultimately were subject to Section 2415(a).[2] Now, however, the government offers

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[2] See *Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act*, 58 Fed. Reg. 15,881 (1993) (because "[s]ome gas sales contracts are nearing the end of time limits set by the Federal Statute of Limitations," and "[s]ome

several reasons why the statute of limitations should not apply. Each is unconvincing.

a. The government concedes (Br. in Opp. 9), as it must, that Section 2415(a) is a "general background statute of limitations." The government asserts, however, that the FOGRMA exempts MMS royalty collection actions from Section 2415(a). That is not so.

The government insists that, in enacting the FOGRMA, Congress did not "intend[] to incorporate" Section 2415(a) "*sub silentio*." Br. in Opp. 12. That assertion turns the proper analysis on its head. Under the terms of Section 2415(a), the limitations period applies to royalty collection actions unless Congress has "otherwise provided." If Congress was silent, then Section 2415(a) remains in force.

The government cannot point to any provision in the FOGRMA that overrides or supersedes Section 2415(a). The government instead relies on the "regulations implementing" the FOGRMA, and on the agency's uncodified "practice," to "create a comprehensive structure" that silently supersedes Section 2415(a). Br. in Opp. 9, 12. But nothing in the FOGRMA mandates or even alludes to the administrative enforcement procedures that the Interior Department prefers

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proceeds paid to settle contractual obligations may be royalty bearing, * * * [r]oyalties may be lost * * * if royalty determinations are not made promptly"); United States Geological Survey, Conservation Division Manual, Release No. 57, at 3, 9 (Oct. 26, 1979) ("The statute of limitations under 28 U.S.C. is six years; therefore, a comprehensive audit shall be conducted on *all* leases within six years."), reprinted in Phillips C.A. Rec. Excerpts Tab 15; Memorandum from Frederick N. Ferguson, Assistant Solicitor, Minerals, United States Department of the Interior, to Chief, Conservation Division, United States Geological Survey (May 10, 1974), reprinted in Appendix to Brief of *Amicus Curiae* American Petroleum Institute 2a ("It is clear that the statute applies to suits by the government to collect rents and royalties").

over conventional contract actions. See Pet. 20 n.9.[3] In any event, the agency's procedural choices cannot restrict the application of the statutory limitations provision; only the express action of Congress, not the contrary preference of an agency or a court, can narrow or override Section 2415(a). See *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979). And Congress said nothing in the FOGRMA that trenches on that Section.

Moreover, an examination of what Congress did say in the FOGRMA does not bolster the government's argument, but demolishes it. In fact, the drafters appear to have used the six-year limitations period in Section 2415(a) as a standard for complementary provisions of the new Act.

For example, the six-year record retention requirement in FOGRMA (30 U.S.C. § 1713(b)) is an express acknowledgement that royalty claims that are more than six years old are presumptively stale. The ability of the government to extend the document retention period in no way carries with it an ability to extend the time to subject lessees to affirmative liability. See *Phillips Petroleum Co.* v. *Lujan*, 951 F.2d 257, 259-260 (10th Cir. 1991). Audits of old records are not futile. If an audit revealed deceptive practices, the statute of limitations might be tolled under 28 U.S.C. § 2416(c). In addition, the government can offset any stale royalty claim against a later claim by the lessee for a refund of a royalty overpayment. See 28 U.S.C. § 2415(f).

The civil penalty actions authorized under the FOGRMA also must be "commenced within 6 years after the date of the act or omission which is the basis for the action." 30

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[3] Of course the government *may* determine royalty liabilities administratively in the first instance. It simply must either sue within the limitations period and ask the court to stay its hand until the administrative process is complete (see Pet. 21 n.11) or argue in a later enforcement action that an administrative payment order tolls the statute.

U.S.C. § 1755. The legislative history makes clear that the "act or omission" that begins the running of the statute is the *original* non-compliance that the MMS intends to correct by the order or notice preceding the imposition of a penalty: the limitations period "is intended to run from the date of the initial act which is the basis for the cause of action." S. Rep. No. 512, 97th Cong., 2d Sess. 19 (1982). Indeed, the Senate Report explicitly linked the civil penalty limitations period with the six-year limitation on record-keeping requirements: "In adopting a six-year statute of limitations, the Committee intends that persons subject to the record-keeping requirements of the [FOGRMA] not be burdened with the need to maintain records for more than six years." *Ibid.*

These provisions do not conflict with the limitations period in Section 2415(a) in any way, but merely complement it. Congress therefore has not "otherwise provided" a limitations period for royalty collection actions. For royalty contracts, as for other government contracts, Congress believed that a six-year limitations period sufficiently preserved the government's rights.

b. The government makes the additional, astonishing claim that an action brought to enforce a lessee's contractual obligation to pay royalties is not "founded upon" a contract at all. Br. in Opp. 14-17. Try as it might, the government cannot disguise the fact that its claim for royalties is "founded upon" its "contract" with a lessee. See 2 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, LAW OF FEDERAL OIL & GAS LEASING § 21.01, at 21-2 (1994).

The Secretary's "responsibility to determine production values and collect royalties" is hardly "independent" of the mineral lease contracts to which that duty applies. Br. in Opp. 16. On the contrary, like the lessee's obligation to pay royalties, the Secretary's responsibility to monitor and collect them is non-existent without a lease. The administrative valuation process merely exercises the government's contrac-

tual right to determine the value upon which contractual royalties are paid. Both the obligation and its enforcement are "founded upon" the lease "contract."

As a substantive matter, the administrative valuation of royalties depends on the "Secretary's construction of the lease contract in the light of the applicable statute and implementing regulations." *United States* v. *Southwest Potash Corp.*, 352 F.2d 113, 116 (10th Cir. 1965), cert. denied, 383 U.S. 911 (1966).[4] That the Secretary exercises his contractual prerogatives through an administrative process does not make the lessor-lessee relationship or the royalty obligation any less contractual.[5]

That conclusion is not undercut by the unsurprising fact that most lessees "either pay the amount due or pursue[] the available administrative [and judicial review] procedures to challenge" a payment order; a lessee may waive its opportunity to contest the substance of the royalty demand unless it seeks some form of review of the MMS's administrative determination. The administrative determination of the amount, however, can lead to private *liability* only through operation of the contract. See *Katz* v. *Cisneros*, 16 F.3d 1204, 1209 (Fed. Cir. 1994) ("any monetary consequences

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[4] *Southwest Potash*, like *United States* v. *General Petroleum Corp.*, 73 F. Supp. 225, 229-230 (C.D. Cal. 1946), aff'd *sub nom. Continental Oil Co.* v. *United States*, 184 F.2d 802 (9th Cir. 1950), was a government-initiated judicial action to collect disputed royalties. See 352 F.2d at 115. See also Pet. 20 n.9. Cf. Br. in Opp. 12.

[5] See *Diamond Shamrock Exploration Co.* v. *Hodel*, 853 F.2d 1159, 1165 (5th Cir. 1989) (rejecting the Secretary's position because it did "not comport with the plain meanings of the words in the lease"); *United States* v. *Essley*, 284 F.2d 518, 520 (10th Cir. 1960); *Continental Oil Co.* v. *United States*, 184 F.2d 802, 807 (9th Cir. 1950) (the "rights of the parties are determined by the provisions of the leases, read in the light of" the relevant statutory provisions). See also *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 625-629 (1950).

will flow through the contractual scheme"). There simply is little practical reason for a lessee to require the government to sue to collect a *timely* royalty obligation once the amount has been fixed by administrative and judicial review. Only the agency's recent tardiness has forced the question.

The FOGRMA did not alter the essentially contractual nature of the duty to pay mineral royalties. Congress recognized that leases impose "a contractual obligation to pay royalties." H.R. Rep. No. 859, 97th Cong., 2d Sess. 16 (1982), reprinted in 1982 U.S.C.C.A.N. 4268, 4270. All that the FOGRMA did — and all that it purported to do — was to provide mechanisms and incentives to improve the Secretary's oversight.[6] Leases remain contracts, and actions to collect royalties remain actions founded upon those contracts — and remain limited by Section 2415(a).

c. The government also contends that the policies that underlie statutes of limitations do not apply to the MMS's ability to collect royalties of unlimited age, so long as the "validity" of the MMS's largely discretionary valuation is "upheld." Br. in Opp. 16. That argument has two flaws. First, a central policy of limitations statutes is that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Bowen* v. *New York*, 476 U.S. 467, 481 n. 13 (1986). Second, even if the "validity" of a claim affected the bar of limitations, the "validity" upon which the government relies stems not from any objective standard, but rather from the Secretary's wide discretion and the necessary deference of reviewing courts. For the claim to be "valid," the Secretary need not be right, even by a

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[6] Before the FOGRMA, the Interior Department used administrative proceedings to determine the value of production, audited lessees, and imposed limited civil penalties. *E.g.*, *California Co.* v. *Seaton*, 187 F. Supp. 445, 447 (D.D.C. 1960), aff'd *sub nom. California Co.* v. *Udall*, 296 F.2d 384 (D.C. Cir. 1961); H.R. Rep. No. 859, *supra*, at 16-18, 33, reprinted in 1982 U.S.C.C.A.N. 4269, 4271-4272, 4287.

preponderance of the evidence, so long as he is neither arbitrary nor capricious. The limitations period is a lessee's only protection against belated and sweeping changes in MMS valuation policy. This Court's review is necessary to preserve that safeguard.

* * * * *

This Court long ago rejected the government's attempt to limit a statute of limitations to a "particular mode of proceeding" in order to bring otherwise-limited actions "at any distance of time." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 340, 342 (1805) (Marshall, C.J.). The Court should grant certiorari to review this modern attempt to use administrative form to defeat congressional intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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